BEFORE THE NATIONAL INDIAN GAMING COMMISSION

IN RE:	Amendment to Metlakatla Indian Community's Gaming Ordinance	)))))

APPEAL OF THE CHAIRMAN'S DISAPPROVAL OF THE METLAKATLA INDIAN COMMUNITY'S PROPOSED AMENDMENT TO ITS CLASS II GAMING ORDINANCE

Joseph H. Webster
Elliott A. Milhollin
HOBBS, STRAUS, DEAN & WALKER, LLP
2120 L Street, N.W., Suite 700
Washington, DC 20037
(202) 822-8282

Of Counsel:

Geoffrey D. Strommer
HOBBS, STRAUS, DEAN & WALKER, LLP
806 SW Broadway, Suite 900
Portland, OR 97205
(503) 242-1745

Table of Contents

Table of Authorities

Cases

Statutes

Regulations

BEFORE THE NATIONAL INDIAN GAMING COMMISSION

IN RE:	Amendment to Metlakatla Indian Community's Gaming Ordinance	)))))

APPEAL OF THE CHAIRMAN'S DISAPPROVAL OF THE METLAKATLA INDIAN COMMUNITY'S PROPOSED AMENDMENT TO ITS CLASS II GAMING ORDINANCE

Introduction

On May 28, 2008, the Metlakatla Tribal Council passed Resolution No. 08-24 to amend its Tribal Gaming Ordinance to clarify that the Metlakatla Indian Community ("Tribe") permits a feature called "auto-daub" to be used in connection with its Class II bingo games ("Amendment"). On June 4, 2008, the Chairman of the National Indian Gaming Commission ("NIGC") issued a decision disapproving the Amendment. For the reasons detailed below, the Chairman's disapproval was in excess of his statutory authority and was arbitrary, capricious and contrary to law. Accordingly, the Chairman's disapproval must be reversed.

1. Background

The Metlakatla Indian Community is a federally-recognized Indian tribe located on the Annette Islands Reserve in Southeast Alaska. Exhibit 5. The Tribe operates a small Class II gaming facility, which is an important source of both revenue and jobs for the Tribe. Exhibits 3, 4. Class II gaming is vital to the Tribe given that the Tribe has been unable to negotiate a Class III gaming compact with the State. Exhibit 4. The Tribe traditionally relied on forest products and its fish cannery to be self-sufficient. Exhibits 3, 4. In recent years these markets have seen a rapid downturn, and the cannery and mills that provided an important part of the economy have been closed. Id. The Tribe's unemployment today stands at approximately 51 percent, approximately 50 to 80 percent higher than most nearby communities. Id. The Tribe is continuing to pursue economic development initiatives in a number of areas, including tourism and development of natural resources, however, the prospects for those efforts are uncertain. Exhibit 3. The revenues generated by the Tribe's Class II bingo facility allow it to continue to fund essential governmental programs in a number of areas, and are critical to maintaining

such programs and developing a diversified economy to sustain the Tribe's members. Exhibit 4.

On May 28, 2008, the Metlakatla Tribal Council passed Resolution No. 08-24 (Exhibit 1) to amend Section 4.2 of its Tribal Gaming Ordinance to clarify that it permits a feature called "auto-daub" to be used in connection with Class II bingo games. Specifically, the Amendment states:

> Class II gaming includes an electronic, computer or other technologic aid to the game of bingo that, as part of an electronically linked bingo system, assists the player by covering, without further action by the player, numbers or other designations on the player's electronic bingo card(s) when the numbers or other designations are electronically determined and electronically displayed to the player.

As described in the Amendment, the aid feature would assist the player by tracking the player's electronic bingo card(s) and, as the numbers for that game are electronically determined and displayed, covering any matching numbers on the player's card(s). The Amendment refers generally to the auto-daub aid feature and is not limited to any specific bingo game or bingo aid product. As noted in the Resolution No. 08-24, the Tribal Council believes that it can generate more revenue, create more jobs and provide more essential services to its members by allowing the use of the auto-daub feature in connection with bingo games offered by the Tribe in its gaming facility. Exhibit 1. Obviously, the use of more profitable bingo games will aid the Tribe in its economic development efforts and in its efforts to provide necessary services to its members.

Pursuant to 25 C.F.R. § 522.3(a), the Tribe was required to submit its Amendment to the Chairman of the NIGC, and did so in a submission dated May 28, 2008. Id. However, on June 4, 2008, the Chairman of the NIGC issued a decision disapproving the Amendment. Exhibit 2. This appeal to the full Commission was timely filed on July 7, 2008, and the Tribe respectfully requests in this appeal that the Commission reverse the Chairman's decision, or in the alternative, that the Chairman reconsider his decision.

2. Applicable Law and Regulations

The IGRA establishes the parameters within which gaming may take place on Indian lands. A tribe may engage in Class II gaming on its lands without a tribal-state compact if the State permits such gaming for any purpose and the tribal governing body adopts an ordinance permitting such gaming, which ordinance is approved by the Chairman of the NIGC. 25 U.S.C. § 2710(b).

Class II gaming is defined under the IGRA:

> (7)(A) The term "class II gaming" means—

(i) the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith)—

(I) which is played for prizes, including monetary prizes, with cards bearing numbers or other designations,

(II) in which the holder of the card covers such numbers or designations when objects, similarly numbered or designated, are drawn or electronically determined, and

(III) in which the game is won by the first person covering a previously designated arrangement of numbers or designations on such cards,

including (if played in the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo, and . . .

(B) The term "class II gaming" does not include—

(i) any banking card games, including baccarat, chemin de fer, or blackjack (21), or

(ii) electronic or electromechanical facsimiles of any game of chance or slot machines of any kind.

25 U.S.C. § 2703(7)(A) - (B).

If a game of chance does not fit within the definition of Class II, it is defined as Class III and may only be played as permitted by an approved tribal-state compact or Secretarial procedures. 25 U.S.C. §§ 2703(8), 2710(d).

In addition to the statutory definition, the NIGC has promulgated regulations that give further guidance in determining what constitutes Class II gaming. The regulations at 25 C.F.R. § 502.3 define Class II gaming as:

(a) Bingo or lotto (whether or not electronic, computer, or other technologic aids are used) when players:

(1) Play for prizes with cards bearing numbers or other designations;

(2) Cover numbers or designations when object, similarly numbered or designated, are drawn or electronically determined; and

(3) Win the game by being the first person to cover a designated pattern on such cards;

(b) If played in the same location as bingo or lotto, pull-tabs, punch boards, tip jars, instant bingo, and other games similar to bingo.

25 C.F.R. § 502.3.

The NIGC revised its definitions of technologic aids, facsimiles and other games similar to bingo in a final rule published on June 17, 2002. 67 Fed. Reg. 41,166 (June 17, 2002). The regulations include the following definitions:

(a) *Electronic, computer or other technologic aid* means any machine or device that:

(1) Assists a player or the playing of a game;

(2) Is not an electronic or electromechanical facsimile; and

(3) Is operated in accordance with applicable Federal communications law.

(b) Electronic, computer or other technologic aids include, but are not limited to, machines or devices that:

(1) Broaden the participation levels in a common game;

(2) Facilitate communication between and among gaming sites; or

(3) Allow a player to play a game with or against other players rather than with or against a machine.

(c) Examples of electronic, computer or other technologic aids include pull tab dispensers and/or readers, telephones, cables, televisions, screens, satellites, bingo blowers,

electronic player stations, or electronic cards for participants in bingo games.

25 C.F.R. § 502.7.

> *Electronic or electromechanical facsimile* means a game played in an electronic or electromechanical format that replicates a game of chance by incorporating all of the characteristics of the game, except when, for bingo, lotto, and other games similar to bingo, the electronic or electromechanical format broadens participation by allowing multiple players to play with or against each other rather than with or against a machine.

25 C.F.R. § 502.8.

> *Other games similar to bingo* means any game played in the same location as bingo (as defined in 25 USC § 2703(7)(A)(i)) constituting a variant on the game of bingo, provided that such game is not house banked and permits players to compete against each other for a common prize or prizes.

25 C.F.R. § 502.9.

These regulations were adopted to replace prior, more restrictive definitions in part to bring the Commission's rules into line with case law interpreting the IGRA. As stated by the NIGC in the preamble, "The uncomfortable result is that the Commission cannot faithfully apply its own [previous] regulations and reach decisions that conform with the decisions of the courts." 67 Fed. Reg. 41,166, 41,168 (June 17, 2002).

3. The Chairman Lacked the Legal Authority to Disapprove the Amendment

Under the IGRA, Indian tribes are the primary regulators of Class II gaming. 25 U.S.C. § 2710(a)-(b). Thus, oversight by the NIGC is limited and decisions on game classification issues are, in the first instance, left to tribal regulators. In this context, the IGRA significantly restricts the grounds on which the Chairman may disapprove a tribal gaming ordinance or amendment. Specifically, 25 U.S.C. § 2710(b)(2) provides that "[t]he Chairman shall approve any tribal ordinance or resolution concerning the conduct, or regulation of class II gaming on the Indian lands within the tribe's jurisdiction if such ordinance or resolution provides that [certain specific matters are addressed[1]]." (Emphasis added.) Further, 25 U.S.C. § 2710(e) provides that "by not later than the date that is 90 days after the date on which any tribal gaming ordinance or resolution is

[1] These matters are limited to provisions addressing sole proprietary interest, use of gaming revenues, audits, protection of the environment and public health and safety, and licensing and background investigations. 25 U.S.C. § 2710(b)(2).

submitted to the Chairman, the Chairman shall approve such ordinance or resolution if it meets the requirements of this section." (Emphasis added.) The NIGC's implementing regulations, 25 C.F.R. Part 522, contain the same limitation.

The listed requirements found in 25 U.S.C. § 2710(b) and the NIGC's implementing regulations at 25 C.F.R. Part 522 do not include game classification issues or the types of permitted electronic aid features. As a result, the Chairman did not have the discretion to disapprove the Amendment since it did not implicate any of the matters Congress authorized as grounds for disapproval in the statute or regulations. Stated otherwise, by using the phrase "shall approve," Congress limited the Chairman's discretion to disapprove tribal gaming ordinances.[2] Although the Chairman may disagree with the definition adopted by the Tribe in the Amendment, the IGRA does not grant him the authority to disapprove the Amendment based on game classification. As noted by the court in Hartman v. Kickapoo Tribe Gaming Commission:

> the court rejects plaintiff's contention that every ordinance must be approved or disapproved by the NIGC. An amendment to an ordinance does not require NIGC approval if it addressed issues not raised in the IGRA or the NIGC's regulations. . . . The only provisions required for such ordinances are those listed in 25 U.S.C. § 2710(b)(2), as incorporated through 25 U.S.C. § 2710(d)(1)(A) and in 25 C.F.R. Part 522.

176 F. Supp. 2d 1168, 1179-80 (D. Kan. 2001), aff'd, 319 F.3d 1230 (10th Cir. 2003).[3] Although the Chairman may contend he has the authority to speak to game classification issues in other contexts, it is clear that Congress did not intend for the Chairman to assert such authority in the context of an ordinance approval.

4. The Amendment is Consistent with the IGRA, Case Law and NIGC Regulations

Even if the Chairman had the power to disapprove an ordinance amendment based on game classification, in this case his disapproval was improper and must be reversed. As noted above, the IGRA expressly permits the game of bingo to be played with "electronic, computer, or other technologic aids." 25 U.S.C. § 2703(7)(A)(i). The Commission has promulgated regulations which broadly define such aids to include electronic player stations, electronic cards and linked bingo systems. 25 C.F.R. § 502.7. In addition, the Commission's regulations expressly state that permitted aids include "any machine or device that: (1) assists a player or the playing of a game . . . ." 25 C.F.R. § 502.7(a)(1).

---

[2] The NIGC has previously determined that "[p]rovisions other than those required under the IGRA or the NIGC regulations that may be included in a tribal ordinance are not subject to review and approval." Exhibit 14; see also, e.g., Exhibits 15 and 16. Neither the IGRA nor the NIGC's regulations specify NIGC oversight of technology components of tribal gaming ordinances.

[3] The Tribe also questions whether the Chairman had a complete understanding of the aid feature described in the Amendment, which (as discussed below) has been a common feature of bingo minders used in Indian and non-Indian bingo halls since before IGRA was enacted in 1988.

The aid feature described in the Amendment would, in the context of an electronically linked bingo game, assist the player and the playing of the game by tracking and covering bingo numbers for the player. As such, it falls squarely within the Commission's definition of electronic, computer, or other technologic aids found at 25 C.F.R. § 502.7. Significantly, the Chairman does not appear to dispute that the auto-daub feature described in the Amendment falls within the Commission's broad definition of aid. Rather, the Chairman appears to base his rejection of the Amendment on two other grounds: (1) the auto-daub feature is inconsistent with the statutory definition of bingo or game similar to bingo; and (2) the use of this feature as part of a linked electronic bingo system makes it a Class III "facsimile." As detailed below, both of these objections lack merit.

a. The Amendment is Consistent with the IGRA Definition of Bingo.

According to the Chairman, the use of auto-daub prevents a game from qualifying as bingo, even if it satisfies the IGRA requirements for bingo in all other respects. Exhibit 2 at 3-6. Under the guise of interpretation, the Chairman is attempting to elevate his opinion that "sleeping" is essential to "traditional" bingo play to a level equal to the three statutory elements for bingo enacted by Congress. In doing so, the Chairman has impermissibly attempted to graft a fourth statutory requirement for bingo onto the IGRA that Congress did not intend. In the view of the Chairman:

> The possibility of sleeping a bingo, then, is an embodiment of the competition in the game and of the language in IGRA's definition of bingo that the winner is the "first person to cover." A small mistake or oversight can cost one player the game and enable another, more attentive player to win. Put somewhat less formally, competition is inherent in the game of bingo as defined in IGRA because "if you snooze, you lose."

Exhibit 2 at 5. The Chairman goes on to explain:

> Though I understand that the game requires multiple players, I do not see how the players are competing against one another to be the first to cover a previously designated winning pattern. The game as described eliminates the element of competition that is a statutory requirement for bingo. The game starts – and ends – with the push of a button. It is not possible to sleep a bingo or fail to claim a prize.

Id.

Stated otherwise, the Chairman appears to take the position that the "first person to cover" requirement in the IGRA definition of bingo requires competition between players and that there can be competition in a bingo game only if the players are permitted to sleep a bingo. However, nothing about the phrase "first person to cover" or any other aspect of the IGRA definition of bingo suggests that the ability to sleep a bingo is a required element of the game. Indeed, in determining whether a game satisfied the statutory elements of bingo, the courts have evaluated what it means for a player to "cover" the numbers on a bingo card when electronic covering is used. U.S. v. 103 Electronic Gambling Devices, No. 98-1984, 1998 WL 827586, at *6 (N.D. Cal. Nov. 23, 1998), aff'd 223 F.3d 1091 (9th Cir. 2000). In dismissing the argument that MegaMania failed to satisfy the definition of bingo because of its electronic daub feature, the court stated that "[t]here is nothing in IGRA . . . that requires a player to independently locate each called number on each of the player's cards and manually 'cover' each number independently and separately." Id. To the contrary, the court emphasized that IGRA "merely require[s] that a player cover the numbers without specifying how they must be covered." Id. Thus, the manner in which players cover numbers on their card(s) is irrelevant.[4]

As has been held by the courts, the three statutory requirements of bingo are the sole legal requirements for a game to qualify as bingo. United States v. 162 MegaMania Gambling Devices, 231 F.3d 713 (10th Cir. 2000); United States v. 103 Electronic Gambling Devices, 223 F.3d 1091 (9th Cir. 2000). The Chairman lacks the power to add requirements to those criteria enacted by Congress and deemed sufficient by federal courts to delineate the game permitted by the IGRA. Those exclusive criteria do not admit the Chairman's musings about whether sleeping should have been part of the statute. It is not.

---

[4] Other than his "view" and a 2003 opinion from his Office of General Counsel, the Chairman provides no support for his position that the ability to sleep is required by the IGRA definition of bingo. Exhibit 2 at 4. However, Office of General Counsel opinions are not final agency action. Instead, they constitute only the legal opinions of the NIGC's lawyers. As explained by the Tenth Circuit Court of Appeals in Seneca-Cayuga Tribe of Oklahoma v. National Indian Gaming Commission, 327 F.3d 1019, 1043 (10th Cir. 2003):

> [A]n agency's opinion letter is not binding, nor, unlike an NIGC regulation enacted pursuant to the rigors of the Administrative Procedure Act, is it entitled to any deference. Instead, the NIGC's opinion letter is at most persuasive authority; it is entitled only to that weight that its power to persuade compels.

In this case, the Office of General Counsel opinion cited by the Chairman cites to no authority in making its argument that IGRA's language implies a specific kind of either physical or electronic participation. Given the brevity of its analysis and the fact that it conflicts with relevant court precedent and the NIGC's previous opinion letters (Exhibits 17, 18), no credence should be given to the assertions of the Office of General Counsel. Further, the Chairman improperly failed to apply the Indian canon of construction in his interpretation of the IGRA and the Commission's regulations. See, e.g., Choate v. Trapp, 224 U.S. 665 (1912).

Whether or not an auto-daub aid is utilized, the game is still won by the first person to cover the winning bingo pattern based on the sequence of bingo numbers for that game and the other cards in play. The first player is the one who covers the winning bingo pattern in the fewest quantity of bingo numbers drawn/determined for that game. Nothing about the auto-daub feature changes the quantity of bingo numbers necessary to be the first player with the winning bingo pattern. Even with auto-daub the "cover" function is performed during the game's natural progression, only after each release of balls, and thus IGRA's sequencing requirement continues to be satisfied. Auto-daub cannot operate independent of the player, and it has no impact on the outcome of the game. The statutory requirements of bingo are satisfied so long as numbers are covered when similarly numbered objects are drawn or electronically determined. The auto-daub aid feature merely assists the player with tracking and covering numbers so the player will not miss a win.[5]

Further, the Chairman is fundamentally wrong that the element of competition in a bingo game is defined by the ability to sleep a bingo. Rather, as defined by the IGRA, the competition lies not in the ability to sleep, but in the fact that each player is competing against the other players in the game to be the first to cover a game-winning pattern on his/her bingo card based on the results of a random ball draw or selection of bingo numbers. Whether or not a player wins depends on the cards in play by that player and other players and the unique sequence of bingo numbers drawn/determined for that game. This competition between the players is present whether or not a player is permitted to "sleep" a bingo.

It is useful to look at each of the three statutory elements of bingo and compare it to a bingo game played with the aid feature described in the Amendment.

I. The game is played for prizes, including monetary prizes, with cards bearing numbers or other designations. In this case, the auto-daub aid feature does not change the fact that the game, itself, is played for money with cards bearing numbers or other designations.

II. The holder of the card covers such numbers or designations when objects, similarly numbered or designated, are drawn or electronically determined. As described in the Amendment, the covering takes place "when the numbers or other designations are electronically determined and electronically displayed to the player." Nowhere in this provision of the IGRA is there any suggestion that a player must be able to sleep a bingo, though nothing prohibits a tribe from adopting such a requirement. As described in the Amendment, the player performs the cover function through the use of an electronic aid device. Although the player is assisted, the cover action is still that of the player, who initiated the auto-daub feature when he/she pushed a multi-purpose button on the bingo

---

[5] This is especially important when a player is playing multiple bingo cards, as is common in both Indian and non-Indian bingo halls. It also is important when the bingo numbers are displayed quickly, in groups or for players who have physical impairments that make it difficult or impossible to cover a card quickly. Exhibits 4, 26.

minder at the beginning of the bingo game. In other words, the aid device is acting on the player's behalf and is not independent of the player. The NIGC Office of General Counsel has previously taken the position that the IGRA does not prevent players from using an agent to cover their cards. As stated in a previous advisory opinion from the NIGC Office of General Counsel, "When the agent plays the [bingo] card for the player, the act of playing the card is deemed to be the act of the player/principal. The legal effect is that the agent *is* the player. Therefore, the use of agents violates neither IGRA's provisions regarding the holder nor NIGC's regulations that discuss the player." Exhibit 17 at 5; see also Exhibit 18. In short, the use of an automatic daubing feature does not mean that it is "the machine, and not the player, that is playing the game." Exhibit 2 at 6.[6]

III. The game is won by the first person covering a previously designated arrangement of numbers or designations on such cards. The aid feature described in the Amendment merely assists the player with tracking and covering the bingo numbers. It is in no way inconsistent with the requirement that the game be won by the first player to cover the winning pattern. The game is won by the first person to cover the pre-designated winning pattern, whether or not the aid feature described in the Amendment is utilized.

The Chairman suggests that his understanding of bingo is based on how the game was "traditionally" played. Exhibit 2 at 3. However, the IGRA explicitly recognized that the game of bingo it authorized was not limited to the children's paper game, and explicitly authorized the use of technologic aids in connection therewith. Accordingly, it is the statutory definition of bingo and not tradition that controls whether a game meets the definition of Class II bingo. As explained by the Ninth Circuit:

> The Government's efforts to capture more completely the Platonic "essence" of traditional bingo are not helpful. Whatever a nostalgic inquiry into the vital characteristics of the game as it was played in our childhoods or home towns might discover, IGRA's three explicit criteria, we hold, constitute the sole legal requirements for a game to count as class II bingo.
>
> There would have been no point to Congress's putting the three very specific factors in the statute if there were also other, implicit criteria. The three included in the statute are in no way arcane if one knows anything about bingo, so

---

[6] We note that "[r]adically inconsistent interpretations of a statute by an agency, relied upon in good faith by the public, do not command the usual measure of deference to agency action." Pfaff v. U.S. Dep't of Hous. and Urban Dev., 88 F.3d 739, 748 (9th Cir. 1996) (citing Cardoza-Fonseca, 480 U.S. at 446, n.30 ("[a]n agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view."); see also, e.g., Natural Res. Def. Council v. U.S. EPA, 526 F.3d 591 (9th Cir. 2008) (vacating EPA rule because it was inconsistent and conflicted with EPA's prior interpretation of the statute).

> why would Congress have included them if they were not meant to be exclusive?
>
> Further, IGRA includes within its definition of bingo "pull-tabs, . . . punch boards, tip jars, [and] instant bingo . . . [if played in the same location as the game commonly known as bingo]," 25 U.S.C. § 2703(7)(A)(i), none of which are similar to the traditional numbered ball, multi-player, card-based game we played as children. . . . Instant bingo, for example, is as the Fifth Circuit explained in Julius M. Israel Lodge of B'nai B'rith No. 2113 v. Commissioner, 98 F.3d 190 (5th Cir. 1996), a completely different creature from the classic straight-line game. Instead, instant bingo is a self-contained instant-win game that does not depend at all on balls drawn or numbers called by an external source. *See id.* at 192-93.
>
> Moreover, § 2703(7)(A)(i)'s definition of class II bingo includes "other games similar to bingo," 25 U.S.C. § 2703(7)(A)(i), explicitly precluding any reliance on the exact attributes of the children's pastime.

103 Electronic Gambling Devices, 223 F.3d at 1096. See also 162 MegaMania Gambling Devices, 231 F.3d at 723 ("While the speed, appearance and stakes associated with MegaMania are different from traditional, manual bingo, MegaMania meets all of the statutory criteria of a Class II game, as previously discussed.").[7]

---

[7] In the preamble to its 1992 definition regulations, the NIGC stated:

> [One] commenter suggested that class II gaming be limited to games involving group participation where all players play at the same time against each other for a common prize. In the view of the Commission, Congress enumerated those games that are classified as class II gaming (with the exception of "games similar to bingo"). Adding to the statutory criteria would serve to confuse rather than clarify. Therefore, the Commission rejected this suggestion.
>
> [Another] commenter questioned whether the definition of bingo in the IGRA limits the presentation of bingo to its classic form. The Commission does not believe Congress intended to limit bingo to its classic form. If it had, it could have spelled out further requirements such as cards having the letters "B" "I" "N" "G" "O" across the top, with numbers 1-15 in the first column, etc. In defining class II to include games similar to bingo, Congress intended to include more than "bingo in its classic form" in that class.
>
> . . . Congress enumerated the games that fall within class II except for games similar to bingo. For games similar to bingo, the Commission added a definition that includes the three criteria for bingo and, in addition, requires that the game not be a house banking game as

While Congress was clear that tribal bingo was not limited by traditional notions of the game, it was equally clear that it intended for tribes to have "maximum flexibility" to use "modern" technology to conduct bingo games. S. Rep. No. 100-446 at 9 (1988), reprinted in 1988 U.S.C.C.A.N. 3071, 3079. In this regard, it is relevant that the type of bingo aid feature described in the Amendment predates passage of the IGRA in 1988. Exhibits 23, 24, 25.[8] Electronic bingo gaming systems which have an auto daub feature have been used for many years. Exhibit 26.

It also is relevant that this very same bingo aid feature is widely permitted today by the federal government on U.S. military reservations and in many other non-Indian bingo facilities. Exhibits 12, 13, 26. To deprive the Tribe of the use of a bingo aid feature that is common in non-Indian bingo facilities would be contrary to Congress' intent that tribes have "maximum flexibility" to use "modern" technology to play bingo games, and in its statutory authorization for tribes to use such aids.[9] This is especially

---

> defined in the regulations. The Commission believes that Congress did not intend other criteria to be used in classifying games in class II.

57 Fed. Reg. at 12,382, 12,387 (April 9, 1992).

[8] For example, an auto-daub aid feature for bingo was patented in 1986. As described in U.S. Patent 4,624,462:

> The primary objective of the invention is to provide an electronic card and board game which relieves the player from the tedious and error-prone operation of manual marking matches on the game card. In particular, it is the objective of the invention to provide a completely automated bingo game in which the player does not have even to touch or watch the game card or the game board at any time during successive rounds of the game, whereas the caller has only to push a single button to control the game. It is the further objective of the invention to provide a design of the game board which facilitates a broad and easy selection of the game cards and games being played with the help of the same game board. An additional objective of the invention is to preclude unauthorized or untimely change of the game card by the player.

Exhibit 23. In fact, fully electromechanical linked aids to the game of bingo featuring full auto-daub were developed as early as 1956 which allowed a player to "either participate in illuminating the numbers or sit back and watch his board operate automatically" and ensured that the "player does not have to watch or exert himself play a board to be assured of winning if in fact the board before him comes up with a winning combination." Exhibit 24; see also, e.g., Exhibit 25. Such auto-daub features increased speed and enjoyment of play and had the added benefit of ensuring honest and accurate play. Moreover, linked electronic gaming systems were well-known before 1988. See, e.g., Exhibit 19, Video Consultants of Nebraska v. Douglas, 367 N.W.2d 697, 699 (Neb. 1985) ("Each location consists of one or more lottery game terminals connected to an agent terminal.")

[9] For example, auto-daub is a permitted feature within a game of bingo in the State of Alabama. Victoryland Dog Track (http://www.quincys777.com/), which is located in Shorter, Alabama, currently operates approximately 3,600 electronic bingo machines that lawfully employ auto-daub. Exhibits 20, 21, 22.

true when, as noted above, the very aid feature described by the Tribe in the Amendment is permitted by the federal government for use in bingo games conducted on U.S. military reservations.

Finally, the Chairman argues that the use of the aid feature described in the Amendment prevents the game from being a game similar to bingo. Exhibit 2 at 6-7. Although the Tribe disagrees with this statement, that issue was not before the Chairman and thus was not an appropriate matter for his decision. The Amendment is limited to the use of the automatic daubing feature in a "game of bingo." Neither the Tribe nor the Amendment present the question of whether such a feature would be permitted in connection with a game similar to bingo, so the issue is irrelevant to the propriety of the Amendment.

b. The Aid Feature Described in the Amendment Would Not Transform the Game of Bingo into a Class III Facsimile.

According to the Chairman, "[a] wholly electronic, fully automated implementation of the game described by the Tribe's amended ordinance is a Class III 'facsimile of any game of chance.'" Exhibit 2 at 7. However, this conclusion can only be reached through a misreading of the Commission's own regulations and a misunderstanding of the Tribe's Amendment.

The IGRA provides that Class II gaming does not include "electronic or electromechanical facsimiles of any game of chance," 25 U.S.C. § 2703(7)(B)(ii), however, the term "facsimile" is not defined by the statute. The Commission has defined facsimile to mean:

> *Electronic or electromechanical facsimile* means a game played in an electronic or electromechanical format that replicates a game of chance by incorporating all of the characteristics of the game, except when, for bingo, lotto, and other games similar to bingo, the electronic or electromechanical format broadens participation by allowing multiple players to play with or against each other rather than with or against a machine.

25 C.F.R. § 502.8 (emphasis added). Thus, the definition provides that a bingo game can be played in an "electronic or electromechanical format" without becoming a facsimile as long as the format requires the players to play with or against each other rather than with or against a machine.

In his decision, the Chairman takes issue with the NIGC's own regulation and asserts that it would incorrectly permit a facsimile to be used in the play of a Class II game unless it requires some "participation in the game by the players above and beyond

the mere pressing of a button to begin the game." Exhibit 2 at 10.[10] The Chairman appears to believe that unless some undefined additional participation is required, the NIGC's own definition would permit "the use of gaming equipment that wholly incorporates and replicates all of the elements and features of a game of chance." Exhibit 2 at 10.

Setting aside, for the moment, the impropriety of the Chairman's disregard for the NIGC's own regulation, the flaw in the Chairman's position is that a format that requires players to play with or against each other necessarily is one that does not incorporate or replicate all of the features of the bingo game. The most fundamental aspect of the game – players competing against each other with different bingo cards against a common ball draw – is not electronic or automatic.[11] The game is, in fact, a live bingo game that is taking place across a linked network of actual players. This remains the case whether or not auto-daub is used, and the Tribe's amendment therefore does nothing to change this fundamental aspect of the game. Said another way, the fundamental characteristics of the game are preserved, unaltered by the game's electronic format. As explained by the NIGC:

> IGRA permits the play of bingo, lotto, and other games similar to bingo in an electronic or electromechanical format, even a *wholly* electronic format, provided that multiple players are playing with or against each other. These players may be playing at the same facility or via links to players in other facilities. A manual component to the game is not necessary. What IGRA does not allow with regard to bingo, lotto, and other games similar to bingo, is a wholly electronic version of the game that does not broaden participation, but instead permits a player to play alone with or against a machine rather than with or against other players.

67 Fed. Reg. 41,166, 41,171 (June 17, 2002) (second emphasis added).[12]

---

[10] "The Supreme Court has long recognized that a federal agency is obliged to abide by the regulations it promulgates." Sameena Inc. v. United States Air Force, 147 F.3d 1148, 1153 (9th Cir. 1998); see also, e.g., Portland General Elec. Co. v. Bonneville Power Admin., 501 F.3d 1009, 1035-36 (9th Cir. 2007) (holding that the Bonneville Power Administration is bound by its own regulations until it adopts new ones, FERC or a court disapproves of its existing regulations, or Congress changes the law).

[11] In contrast, this likely would not be the case if the other players in the game were computer generated virtual players. Similarly, a bingo game that permitted only a single player to play against the ball draw might be said to be a facsimile. Neither situation is the case with the Amendment proposed by the Tribe.

[12] Contrary to the NIGC's clear direction in a formal rulemaking that a manual component to the game of bingo is not necessary, the Chairman is seeking to add an additional manual component to the game by grafting a "sleep" requirement onto the IGRA definition of bingo. The Chairman cites to no action by Congress or the courts suggesting that such a radical change is necessary, and has provided no reasoned basis for doing so now. Significantly, neither the Justice Department nor the NIGC has brought an enforcement action to challenge the Class II status of a game in the years since the NIGC revised its definition regulations in 2002.

The NIGC's existing definition of facsimile is consistent with legislative history and case law. The legislative history indicates that Congress did not intend the facsimile prohibition to restrict the use of electronics to play games that meet the IGRA definition of bingo. Instead, the term facsimile was used as shorthand for games where, unlike true bingo games, the player plays only with or against the machine and not with or against other players. As explained in the Senate Report:

> The Committee specifically rejects any inference that tribes should restrict class II games to existing games [sic] sizes, levels of participation, or current technology. The Committee intends that tribes be given the opportunity to take advantage of modern methods of conducting class II games and the language regarding technology is designed to provide maximum flexibility. In this regard, the Committee recognizes that tribes may wish to join with other tribes to coordinate their class II operations and thereby enhance the potential of increasing revenues. For example, linking participant players at various reservations whether in the same or different States, by means of telephone, cable, television or satellite may be a reasonable approach for tribes to take. Simultaneous games participation between and among reservations can be made practical by use of computers and telecommunications technology as long as the use of such technology does not change the fundamental characteristics of the bingo or lotto games and as long as such games are otherwise operated in accordance with applicable Federal communications law. In other words, such technology would merely broaden the potential participation levels and is readily distinguishable from the use of electronic facsimiles in which a single participant plays a game with or against a machine rather than with or against other players.

S. Rep. No. 100-446 at 9 (1988), reprinted in 1988 U.S.C.C.A.N. 3071, 3079 (emphases added).

Contrary to the Chairman's assertion, therefore, the use of technology, even if it allows fundamental characteristics of bingo to be played in an electronic format, does not necessarily make a bingo game a "facsimile." Rather, a bingo game played using technologic aids (which are expressly permitted by 25 U.S.C. § 2703(7)(A)(i)), only becomes a facsimile if the technology permits the player to play "with or against a machine rather than with or against other players."[13]

---

[13] A good example of a facsimile of a game of chance is video poker, as commonly played in self-contained game terminals. Such a game, although it uses poker graphics and terminology, is a wholly

The courts have agreed with this interpretation. In the MegaMania cases, the courts ruled that MegaMania is not an exact copy or duplicate of bingo and thus not a facsimile because the game of bingo is not wholly incorporated into the player station; rather, the game of bingo is independent from the player station, so that the players are competing against other players in the same bingo game and are not simply playing against the machine. See 103 Electronic Gambling Devices, 223 F.3d at 1100; 162 MegaMania Gambling Devices, 231 F.3d at 724.[14] The auto-daub aid feature does not change this.

Thus, the Chairman is wrong to assert that some additional participation is required to prevent the game from becoming a facsimile. Instead, the NIGC definition of facsimile correctly recognizes that, regardless of the number of electronic aids used in a bingo game, the game does not become a facsimile if "the electronic or electromechanical format broadens participation by allowing multiple players to play with or against each other rather than with or against a machine." 25 C.F.R. § 502.8 (emphasis added). As long as there are players playing against each other, the game is not a facsimile.

In this case, the Amendment describes an aid feature that is used as part of an "electronically linked bingo system." The linked system broadens participation by allowing players to play against each other in a common game. The Amendment does

---

electronic game that does not permit competition among players. Unlike a true poker game, in video poker the game takes place solely within the device. Similarly, a wholly electronic bingo game that permitted only a single player to play against the ball draw would be a facsimile. There are electronic bingo games that operate in this manner, but such games would not be permitted under the Amendment.

[14] The applicable test for distinguishing between aids and facsimiles was explained by the Tenth Circuit:

> Courts reviewing the legislative history of the Gaming Act have recognized an electronic, computer or technological aid must possess at least two characteristics: (1) the "aid" must operate to broaden the participation levels of participants in a common game, see Spokane Indian Tribe v. United States, 972 F.2d 1090, 1093 (9th Cir. 1992); and (2) **the "aid" is distinguishable from a "facsimile" where a single participant plays with or against a machine rather than with or against other players**. Cabazon Band of Mission Indians v. National Indian Gaming Comm'n, 14 F.3d 633, 636-37 (D.C. Cir.), cert. denied, 512 U.S. 1221 (1994) (Cabazon III). Courts have adopted a plain-meaning interpretation of the term "facsimile" and recognized a facsimile of a game is one that replicates the characteristics of the underlying game. See Sycuan Band of Mission Indians v. Roache, 54 F.3d 535, 542 (9th Cir. 1994) ("the first dictionary definition of 'facsimile' is 'an exact and detailed copy of something.' " (quoting Webster's Third New Int'l Dictionary 813 (1976))), cert. denied, 516 U.S. 912 (1995); Cabazon II, 827 F. Supp. at 32 (same); Cabazon III, 14 F.3d at 636 (stating "[a]s commonly understood, facsimiles are exact copies, or duplicates.").

162 MegaMania Gambling Devices, 231 F.3d at 724 (emphasis added).

not propose a system where a player is permitted to "play against a machine." Further, the auto-daub feature itself broadens participation by opening the game to people who might not otherwise have the ability (due to age or physical impairment) to participate in a bingo game where the auto-daub feature was not available. Exhibits 4, 26. Stated otherwise, the auto-daub feature broadens participation by leveling the playing field for all players, thus making the game available to a larger number of players. As such, under the plain language of the NIGC's definition regulations, the aid feature described in the Amendment is not a facsimile.

However, even if the Chairman is correct that some additional ("even minimal") participation in the game were required, the aid feature described in the Amendment does not lessen participation in the game. The Amendment merely proposes to generally allow an aid to track and cover bingo numbers for a player participating in an electronically linked bingo game. It does nothing to lessen the competition between players to be the first to obtain a winning pattern, nor does it do anything to lessen other aspects of player participation such as the selection of a bingo card or cards by the player, deciding the number of cards to play, deciding how much to bet in a particular game and collecting any winnings. For these reasons, the use of the aid feature described in the Amendment is consistent with even the Chairman's overly restrictive test.

The Chairman's position, that the plain language of the agency's own regulatory definition of facsimile is wrong, is unsupportable as a matter of law. Although it is true that an agency's interpretation of its own regulations is entitled to some deference, that is only true when that interpretation is not "plainly erroneous or inconsistent with the regulation." Auer v. Robbins, 519 U.S. 452, 461 (1997) (citation omitted). Moreover, when the current interpretation runs counter to the intent at the time of regulation's promulgation, Auer deference is unwarranted. Gonzalez v. Oregon, 546 U.S. 243, 258 (2006) (citing Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1999)). Auer deference is only warranted when the regulation itself is ambiguous and open to interpretation. As the Supreme Court has made clear, when the language of a regulation is clear, an agency cannot effectively amend the regulation under the guise of "interpretation." See Christensen v. Harris County, 529 U.S. 576, 588 (2000) (holding that "[t]o defer to the agency's position would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation.").[15] As such, the Chairman's decision to disregard the plain language of the NIGC's current definition under the guise of interpretation is entitled to no deference.

---

[15] We note as well that although it is true that agencies may choose to make new law through adjudication rather than rulemaking, reliance on adjudication may amount to an abuse of discretion in some situations. See Pfaff, 88 F.3d at 748 (citing NLRB v. Bell Aerospace Co., 416 U.S. 267, 294 (1974)). As the Ninth Circuit made clear, "[s]uch a situation may present itself where the new standard, adopted by adjudication, departs radically from the agency's previous interpretation of the law, where the public has relied substantially and in good faith on the previous interpretation, where fines or damages are involved, and where the new standard is very broad and general in scope and prospective in application." Id.

5. A Decision on this Appeal Should be Deferred

Finally, the Tribe believes that there would be a significant inequity if the Commission decides this appeal while there is a vacancy on the three-member commission. Without a third member, there is no possibility for the Chairman's decision to be reversed, unless the Chairman, himself, reverses his position. The inability to receive a fair and impartial decision on the Tribe's appeal violates fundamental principles of Due Process and administrative law. As stated by the court in Blackwell College of Business v. Attorney General, 454 F.2d 928, 936 (D.C. Cir. 1971):

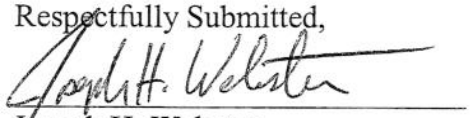
> The ultimate requirement is a procedure that permits a meaningful opportunity to test and offer facts, present perspective, and invoke official discretion. This was not provided by the INS repair of makeshift procedure that remanded the matter for decision to an official who had not only already crystallized a decision but had done so in a context marred by procedural shortcomings.

Similarly, a decision on this appeal in the absence of a full Commission will not provide the Tribe with a meaningful opportunity to challenge the Chairman's decision. As noted above, the Chairman himself controls the outcome of this appeal and has already crystallized his position on the issue, including his stated disagreement with the NIGC's own existing definition regulations.

Conclusion

For the reasons detailed above, the Tribe respectfully requests that the Commission reverse the decision of the Chairman to disapprove the amendment to Section 4.2 of the Metlakatla Tribal Gaming Ordinance. Alternatively, the Tribe requests that the Chairman reconsider his decision.

Respectfully Submitted,



Joseph H. Webster
Elliott A. Milhollin

HOBBS, STRAUS, DEAN & WALKER, LLP
2120 L Street, N.W., Suite 700
Washington, DC 20037
(202) 822-8282

Dated: July 7, 2008

Attorneys for the Metlakatla Indian Community

Of Counsel:

Geoffrey D. Strommer
HOBBS, STRAUS, DEAN & WALKER, LLP
806 SW Broadway, Suite 900
Portland, OR 97205
(503) 242-1745

List of Exhibits

1. Metlakatla Indian Community Gaming Ordinance Amendment Submission to NIGC (May 28, 2008)

2. NIGC Chairman's Disapproval of Metlakatla Indian Community May 28, 2008 Gaming Ordinance Submission to NIGC (June 4, 2008)

3. Declaration of Mayor Karl S. Cook, Jr. (June 23, 2008)

4. Declaration of Council Member Paul T. Brendible (June 30, 2008)

5. Maps and Photographs of the Metlakatla Indian Community's Annette Island Reserve and Bingo Hall

6. Metlakatla Indian Community of the Annette Islands Reserve Report on Bald Head Aggregate Area (April 2002)

7. History of the Metlakatla Indian Community (2003)

8. United States Department of Agriculture Rural Community Empowerment Program (EZ/EC Program) - Report on Metlakatla Indian Enterprise Community Program

9. Alaska Division of Community and Regional Affairs Alaska Community Database Community Information Summaries on Metlakatla

10. United States Environmental Protection Agency Brownfields Showcase Community Fact Sheet for the Metlakatla Indian Community

11. Gaming Laboratories International (GLI) Report on One-Touch Auto-Daub (June 24, 2008)

12. Declaration of Mark Newton (June 24, 2008)

13. Examples of Auto-Daub Aids

14. Letter from NIGC Chairman Harold Monteau to Lt. Governor Ken Blanchard (January 10, 1995)

15. Letter from NIGC Commissioner Tom Foley to Chairperson Maryann Martin (March 27, 1997)

16. Letter from NIGC Chairman Anthony J. Hope to President Jeffrey D. Parker (August 31, 1993)

17. NIGC Advisory Opinion That National Indian Bingo Using Agents to Daub Cards is Class II (November 14, 2000)

18. NIGC Advisory Opinion That MegaBingo Using Agents to Daub Cards is Class II (July 26, 1995)

19. Bingo King Catalog 1988-1989

20. Second Amended and Restated Rules and Regulations for the Licensing and Operation of Bingo Games in Macon County, Alabama

21. Alabama Charitable Bingo (Quincy's 777 Casino) Advertising Electronic Bingo with Full Auto Daub

22. CasinoCity Summary of VictoryLand and Quincy's 777 Casino in Alabama

23. United States Patent 4,624,462, Itkis, Nov. 25, 1986

24. United States Patent 2,760,619, Peak, Aug. 28, 1956

25. United States Patent 3,671,041, Taylor et al., June 20, 1972

26. Declaration of Brian Foster (July 7, 2008)